

Defining “Private Life” Under Article 8 of the European Convention on Human Rights by Referring to Reasonable Expectations of Privacy and Personal Choice

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INTRODUCTION

A Norwegian County has ruled that smoking in the workplace is a basic human right, rejecting a ban introduced in one town on municipal employees

Since January 1, municipal employees in Levanger in central Norway had been banned from smoking during work hours, both on or off town property and even when they were on breaks, business trips abroad or traveling in their own cars on business.

Three members of Levanger’s city council appealed the municipal by-law and regional officials found that the by-law violated citizens’ right to a *private life*, as defined by the European Convention on Human Rights

The ruling came as the Scandinavian country prepares to impose a total ban on smoking in public places, including bars, restaurants and discos, on June 1 [2004].¹

The above-noted news story highlights a problem that has plagued the institutions of the European Convention on Human Rights² since its effective date in 1953: What subject matter should fall within the meaning of “private life” under Article 8 of the Convention so as to be protected from unjustified governmental interference?

The European Court (and, previously, Commission)³ of Human Rights have failed, by certain commentators’ accounts, to provide sufficient guidance on the subject. To some, the “Commission’s practice concerning the meaning of private life has been distinguished neither by its clarity nor its discipline,”⁴ others have called Article 8 “elusive,”⁵ and yet others have

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¹ *Smoking a Basic Human Right, Norwegian County Rules*, Agence France Presse (14 Apr. 2004) (emphasis added) (obtained from the Westlaw periodical database on 10 July 2004).

² The treaty is officially known as the Convention for the Protection of Human Rights and Fundamental Freedoms and it became effective on 3 September 1953. The Convention presently has 46 countries as contracting members.

³ The Commission was abolished in November 1998.

⁴ D.J. Harris, M. O’Boyle, and C. Warbrick, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* p. 305 (1995) [hereinafter Harris].

simply remarked that the present state of affairs is due to the fact that defining “the notion of ‘privacy’ or ‘private life’ . . . is very hard to do.”⁶ Much of the criticism has stemmed from the fact that the Convention institutions have taken a case-by-case approach to defining private life, rather than providing a general or exhaustive definition of the phrase.

Nevertheless, it can be gleaned from the case law that the European Court of Human Rights has been trying, particularly in the last seven years, to provide more guidance and perhaps even construct a general (albeit not exhaustive) definition. I have in mind here several recent decisions of the Court that have referred to a person’s reasonable expectations of privacy as the possible standard. This Paper will explore the development of this recent trend and propose the direction in which the Court should head in the years to come.

Part I of this Paper introduces the reader to Article 8 of the Convention. I first discuss how the Court approaches an Article 8 complaint and then briefly describe the interpretive methods the Court employs in assessing it. I next discuss how the Convention institutions have gradually sculpted the meaning of private life on a case-by-case basis. The reader will learn that Strasbourg has essentially recognized two components of private life. The first is a *privacy* component that governs the traditional idea that some matters should be kept secret or free from publicity, whereas the second “concerns a sphere within which everyone can freely pursue the development and fulfillment of his personality,”⁷ which I refer to as the *personal choice* component.

Part II discusses the emergence in 1997 of a “reasonable expectation of privacy” test in some of the Court’s opinions as a means for determining whether the *privacy* component of private life has been implicated. Five different opinions are discussed and critiqued, concluding with the Court’s most recent pronouncement on the issue in *von Hannover v. Germany*.⁸ I conclude that despite some early signs of trepidation (due, in my mind, to uncertainty on how to apply the test), the Court appears eager to pursue or at least explore reasonable expectations as the benchmark in future cases.

Part III concludes that although the “reasonable expectation of privacy” test is only in its infancy at Strasbourg, the test provides a promising foundation for future analyses of whether private life is implicated. I propose that the test should be further refined and expanded to include not only analysis of *privacy* component claims, but *personal choice* claims as well. Private life cases should be analyzed with some species of the following principle: A public authority may not without proper justification interfere with or fail to respect matters in which a person has a reasonable expectation of privacy or personal choice. The remaining sections of Part III suggest how the Court should apply such a test.

⁵ Luke Clements, Nuala Mole, and Alan Simmons, *EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION* p. 176 (2d ed. 1999) [hereinafter Clements].

⁶ J.G. Merrills and A.H. Robertson, *HUMAN RIGHTS IN EUROPE* p. 138 (4th ed. 2001).

⁷ Ursula Kilkelly, *THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE* p. 11 (2001).

⁸ No. 59320/00 (24 June 2004).

I. INTRODUCTION TO ARTICLE 8 AND THE CONVENTION INSTITUTIONS' DEVELOPMENT OF THE MEANING OF "PRIVATE LIFE"

Article 8 states in its entirety:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 has been called "one of the most open-ended provisions of the Convention"⁹ undoubtedly because none of its terms is further defined. Despite the various opportunities for interpretation, this Paper is most concerned with the meaning of a single phrase: "private life."¹⁰ Before proceeding to an analysis of that phrase, however, I think it is important first to discuss, by way of background, how the Court generally determines whether there has been a violation of Article 8 and the methods of interpretation the Court utilizes. After painting this backdrop, I then summarize how the Convention tribunals have defined the meaning of "private life" through their case-by-case approach.

A. The Court's Approach to Finding a Violation of Article 8

The Court generally determines whether a violation under Article 8 has occurred by employing a three-step analysis. First, the Court decides whether Article 8 is at all applicable by analyzing whether the case involves private life, family life, home or correspondence. This is the step that this Paper is most concerned with. Second, if any one of the triggering rights is involved, the Court then moves on to decide whether a public authority has either interfered with that right or has failed to take steps to protect that right from interference by others. Cases dealing with an interference by a public authority are said to invoke the *negative obligation* aspect of Article 8--*i.e.*, the government must ordinarily *refrain* from interfering with a person's rights--whereas the other class of cases are said to invoke the *positive obligation* aspect--*i.e.*, sometimes the government must *take positive steps*, perhaps by creating other rights, to prevent others from interfering with a person's rights under Article 8.¹¹ The hook for imposing negative obligations comes directly from paragraph 2, while

⁹ Clare Ovey and Robin C.A. White, JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS p. 217 (3d ed. 2002) [hereinafter Ovey].

¹⁰ Although the Convention uses the expression "private and family life," the Convention institutions routinely split the phrase into "private life" and "family life."

¹¹ The prototypical negative obligation case involves a police authority interfering with private life by using a covert listening device to obtain information from a suspect. *See, e.g., A. v. France*, No. 14838/89, A-277-B, 17 EHRR 462 (23 Nov. 1993) (involving the recording of a telephone conversation). An example of a positive obligation case may be found in *Hatton et al. v. UK*, No. 36022/97, 34 EHRR 1 (2 Oct. 2001), where the applicant complained that the noise from Heathrow airport at night was interfering with his private and family life. The Court explained:

positive obligations stem from the State’s duty under paragraph 1 to “respect” a person’s rights under Article 8.¹²

In the third step, the Court essentially asks whether the State’s acts or omissions are justified. The route taken here depends on the nature of the alleged transgression. In traditional negative obligation cases, the Court expressly relies on paragraph 2 and analyzes whether the government’s interference was (1) made in accordance with the laws of the State in question, (2) pursues one or more of the exhaustive, legitimate aims listed in paragraph 2, and (3) can be regarded as necessary in a democratic society to accomplish the aim(s) pursued. In positive obligation cases, the analysis differs slightly because paragraph 2 is not by its own terms designed to address cases where the interference comes from someone other than a public authority. Indeed, early case law suggested that a violation of a positive obligation under Article 8(1) could be found “without there being any call to examine it under paragraph 2.”¹³ Nowadays, however, the Court employs a balancing test that uses the aims in paragraph 2 as a non-exhaustive guide and measures “the competing interests of the individual [against the interests] of the community as a whole.”¹⁴

Lastly, it bears noting that in measuring the purported justifications in both the negative and positive contexts, “the State enjoys a certain margin of appreciation [or discretion] in determining the steps to be taken to ensure compliance with the Convention.”¹⁵ Because of “their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the . . . ‘necessity’ of a ‘restriction’ or ‘penalty.’”¹⁶ The amount of discretion afforded to national authorities varies according to the circumstances, however. For example, where there is a consensus on an issue between the laws of the Convention States, then “the margin of appreciation will be narrow and deviation from it will be difficult to justify.”¹⁷ The opposite

. . . Heathrow airport and the aircraft which use it are not owned, controlled or operated by the Government or by any agency of the Government. The Court considers that, accordingly, the United Kingdom cannot be said to have “interfered” with the applicant’s private or family life. Instead, the applicant’s complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant’s rights under Article 8(1) of the Convention.

Id. at ¶ 95. Although the Grand Chamber in *Hatton* eventually found no violation of Article 8, see *Hatton et al. v. UK*, No. 36022/97[GC], ¶ 130, 37 EHRR 611 (8 July 2003), had it ruled in favor of the applicants, the Government might have had to legislate new noise or flight restrictions at the airport in order to comply with its positive obligations.

¹² See *Marckx v. Belgium*, No. 6833/74[PC], ¶ 31, A-31, 2 EHRR 330 (13 June 1979) (“[Article 8] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.”).

¹³ *Id.*

¹⁴ *Powell & Rayner v. UK*, No. 9310/81, ¶ 41, A-172, 12 EHRR 355 (21 Feb. 1990) (“[E]ven in relation to the positive obligations flowing from the first paragraph of Article 8, in striking [the required] balance the aims mentioned in the second paragraph may be of certain relevance.”).

¹⁵ *Id.*

¹⁶ *Handyside v. UK*, No. 5493/72[PC], ¶¶ 48-49, A-24, 1 EHRR 737 (7 Dec. 1976).

¹⁷ *Kilkelly*, *supra* note 7, at p. 7.

holds true, however, if “customs, policies and practices vary considerably between contracting states.”¹⁸ Strasbourg also has ruled that there is “usually a wide margin of appreciation in questions of morals, in relation to the implementation of positive obligations, when there is a foreseeable danger to public safety and urgent measures are required[,] and when dealing with national security.”¹⁹ Conversely, “where Government policy in the form of criminal laws interferes with a particularly intimate aspect of an individual’s private life, the margin of appreciation left to the Government will be reduced in scope.”²⁰

B. The Court’s Methods of Interpretation

Also important to an understanding of this Paper are some of the interpretative methods the Court employs to inject meaning into words and phrases of the Convention. The most prominent of these principles may be grouped as follows: (1) the Vienna Convention principle of textual interpretation in light of object and purpose; (2) dynamic interpretation; and (3) autonomous interpretation.

As with most treaties, the Court has stated that in interpreting the Convention it should first utilize the interpretative methods described in the Vienna Convention on the Law of Treaties.²¹ Therefore, words and phrases must be interpreted according to their ordinary meaning and in light of the object and purpose of the European Convention on Human Rights.²² Generally speaking, the object and purpose of the Convention is to “maintain and promote the ideals and values of a democratic society.”²³ As will be demonstrated in Part I.C, this canon of interpretation has been used by the Court to define private life in a way that arguably exceeds its ordinary meaning.²⁴

¹⁸ *Id.* at p. 8.

¹⁹ Iain Cameron, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS pp. 96-97 (4th ed. 2002).

²⁰ *Hatton* [GC], *supra* note 11, at ¶ 102.

²¹ *See Golder v. UK*, No. 4451/70[PC], ¶ 29, A-18, 1 EHRR 524 (21 Feb. 1975).

²² *See* Vienna Convention Art. 31. The Vienna Convention also states that terms may sometimes be interpreted by referring to an instrument’s legislative history or *travaux préparatoires*. *See* Vienna Convention Art. 32. However, the legislative history of the Convention on Human Rights provides no guidance whatsoever on how to define “private life.” *See, e.g.,* Louise Doswald-Beck, *The Meaning of the “Right to Respect for Private Life” Under the European Convention on Human Rights*, 4 HUMAN RIGHTS L.J. 283, p. 286 (1983) (“[T]here is no discussion at all as to the meaning of private life.”); Jacques Velu, *The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications in PRIVACY AND HUMAN RIGHTS* p. 15 (A.H. Robertson ed. 1973) (“Scrutiny of the *travaux préparatoires* on Article 8 of the Convention does not provide much material for interpretation.”).

²³ *Cruz Varas et al. v. Sweden*, No. 15576/89[PC], ¶ 119, A-201, 14 EHRR 1 (7 June 1990); *see also* Ovey, *supra* note 9, at p. 37 (“The yardstick of democratic standards runs through the Convention and has proved to be an important source of inspiration in delimiting the requirements of the Convention.”).

²⁴ *See, e.g.,* P. van Dijk and G.J.H. van Hoof, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* pp. 73-74 (3d ed. 1998) (“The emphasis placed on object and purpose of the Convention . . . has led the Court, on many occasions, to adopt a fairly progressive or activist approach.”) [hereinafter van Dijk].

It logically follows from the emphasis placed upon the object and purpose of the Convention, that terms in the Convention must be interpreted dynamically.²⁵ That is to say, the Convention should be read as a living instrument, one where the meaning of terms may change over time depending on societal views. As was recently stated:

The standards of the Convention are not regarded as static, but as reflective of social changes. This evolutive approach towards interpretation of the Convention implies that the Commission and the Court take into account contemporary realities and attitudes, not the situation prevailing at the time of the drafting of the Convention in 1949-1950.²⁶

Judge Loucaides has noted that application of this canon “promises that new rights derived from the notion of ‘private life’ will continually be recognized whenever required by the conditions of social life.”²⁷ (Indeed, the principle can arguably be seen in the Court’s decisions that acknowledge homosexuality and transsexuality as components of private life).²⁸ Others have argued, however, that the Court should take care not to cross the fine line between “interpreting an existing right in dynamic fashion and creating new rights”²⁹ out of whole cloth.³⁰

The Court also is cognizant of a need to take an autonomous approach to interpreting certain provisions of the Convention. Some of the concepts and “terms used in this treaty are considered to have a special, autonomous meaning, which is independent from, and does not necessarily correspond to, the meaning which identical or similar terms may have in the

²⁵ See Harris, *supra* note 4, at p. 7.

²⁶ van Dijk, *supra* note 24, at pp. 77-78; see also Philip Leach, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS p. 96 (2001) (“The Convention is seen as a ‘living instrument’ and therefore the role of the Court is to interpret the Convention in the light of present day conditions and situations, rather than to try to assess what was intended by the original drafters of the Convention in the late 1940s.”); Andrew Drzemczewski, THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE p. 17 (1984) (“[M]ore often than not--especially with respect to Article 8--both the Commission and the Court have been prepared to interpret the [C]onvention’s provisions by emphasising the evolutive, dynamic and progressive elements of principles enshrined therein.”).

²⁷ Loukis G. Loucaides, *Personality and Privacy Under the European Convention on Human Rights* in ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS p. 86 (1995).

²⁸ See Part I.C *infra*.

²⁹ Cameron, *supra* note 19, at p. 61.

³⁰ See Heribert Golsong, *Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties?* in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS pp. 151-161 (R. St. J. Macdonald, F. Matscher, and H. Petzold eds. 1993) (complaining that the Convention institutions have used the concepts of dynamic and autonomous interpretation to deviate wrongly from the intended meaning of the Convention); *Deumeland v. Germany*, No. 9384/81[PC], ¶ 24, A-100, 8 EHRR 448 (29 May 1986) (joint dissenting opinion) (“An evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions, but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the Member States of the Council of Europe.”).

domestic law of the Contracting States.”³¹ The reason for maintaining the interpretive distance is simple. As Professor Cameron has explained, “[c]ertain terms used in the Convention must logically mean something different from the equivalent terms in national legal systems, as otherwise the Convention is simply a ratification of the existing state of national institutions and civil liberties.”³² Of course, this is not to say that every term *must* have a different meaning, but it gives the Court the wiggle room necessary to maintain its independence. Again, commentators have warned, however, that “this method must be used by the interpreter with great care, because otherwise he runs the risk of creating so-called autonomous concepts which do not have any foundation in the Convention system itself.”³³

C. The Meaning of Private Life as Interpreted by Strasbourg

Having covered the procedural aspects of the Court’s jurisprudence, I now turn to its substance. Over the years, the Court has refined and expanded its interpretation of the phrase “private life,” but it has not (until arguably recently)³⁴ attempted a general definition. A review of the case law and academic literature demonstrates that the Court has created two main categories of protection within the rubric of private life: (1) those matters that come within the traditional meaning of privacy, *i.e.*, matters that should be kept secret or free from publicity--labeled herein as the *privacy* component; and (2) those matters that involve a person’s personality or autonomy--labeled herein as the *personal choice* component. I briefly trace these developments in the next several paragraphs.³⁵

There seems to be little doubt that the Convention organs have always understood private life to encompass the ordinary and traditional meaning of privacy. That is to say, that as a general principle, Strasbourg has always recognized that the right to private life means the right to “live, as far as one wishes, protected from publicity.”³⁶ Nevertheless, as has been noted previously, the exact contours of this *privacy* component have been left for determination on a case-by-case basis. In that fashion, Strasbourg has over the years found the following matters (among others) to implicate the *privacy* component of Article 8: (1) a person’s HIV status;³⁷ (2) a secret police register containing personal information about the

³¹ van Dijk, *supra* note 24, at p. 77.

³² Cameron, *supra* note 19, at p. 64.

³³ F. Matscher, *Methods of Interpretation of the Convention* in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS p. 73 (R. St. J. Macdonald, F. Matscher, and H. Petzold eds. 1993).

³⁴ See Part II *infra* regarding the emerging “reasonable expectation of privacy” test in the case law.

³⁵ It is important to note that the Convention institutions do not expressly separate their analyses into these two categories. This is a construction, based on my reading of the cases, which I believe best compartmentalizes the rights. My reason for choosing the “personal choice” label in particular--as opposed to stating “personality,” as the Court has--will become apparent in Part III of this Paper. Suffice to say, that the proposal herein would be conceptually (and grammatically) unworkable with the “personality” label.

³⁶ G. Cohen-Jonathan, *Respect for Private and Family Life* in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS p. 406 (R. St. J. Macdonald, F. Matscher, and H. Petzold eds. 1993), *quoting* *X. v. Iceland*, No. 6825/74, 5 DR 86 (18 May 1976).

³⁷ See *Z. v. Finland*, No. 22009/93, ECHR 1997-I, 25 EHRR 371 (25 Feb. 1997) (applicant’s medical records with HIV status used in a criminal prosecution).

applicant;³⁸ (3) social services records containing information about a person’s formative years;³⁹ and (4) a person’s gender identification in transsexual cases.⁴⁰ Fortunately, many of the cases have been easy for the Court and Commission to decide, typically because the government acknowledged or did not contest the private nature of the matter involved. But unfortunately, Strasbourg has not as of yet provided sufficient and consistent guidance for deciding the tough cases.

Not surprisingly, most of the action in the case law has related to the *personal choice* component of private life. The Commission made its first step to expand beyond *privacy* and into *personal choice* in its decision *X. v. Iceland*,⁴¹ a case challenging a regulation that prohibited the applicant from keeping a dog in his home. There, the Commission stated:

For numerous anglo-saxon and French authors the right to respect for ‘private life’ is the right to privacy, the right to live, as far as one wishes, protected from publicity.

In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one’s own personality.

The Commission cannot, however, accept that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings, insofar as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationship within the private sphere. [¶] . . . It follows that Article 8 of the Convention cannot be interpreted such as to secure to everybody the right to keep a dog.⁴²

Private life was later expanded further by making the concept of “personality” the point of departure for future decisions. The Commission stated in *Brüggemann & Scheuten v. Germany*, that the “right of respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his

³⁸ See *Leander v. Sweden*, No. 9248/81, A-116, 9 EHRR 433 (26 Mar. 1987) (applicant denied access to a police register which allegedly contained personal information about him).

³⁹ See *Gaskin v. UK*, No. 10454/83[PC], A-160, 12 EHRR 36 (7 July 1989) (applicant denied the right to examine a social services file concerning his childhood history).

⁴⁰ See *B. v. France*, No. 13343/87[PC], A-232-C, 16 EHRR 1 (25 Mar. 1992) (applicant’s request denied to change her civil status from male to female and her name from Norbert Antoine to Lyne Antoinette).

⁴¹ No. 6825/74, 5 DR 86 (18 May 1976).

⁴² *Id.* at ¶¶ 11-13, 16. It is questionable whether the outcome of this case would be the same had the Court applied the test proposed in Part III of this Paper and framed the question as being whether a reasonable person, without reference to any purported justifications offered by the government for the restriction, would expect that the decision to keep a dog as a house pet is a matter of personal choice. See *infra* Part III.

personality.”⁴³ Since then, the Convention organs have held, in piecemeal fashion, that the following also implicate the *personal choice* component of private life: (1) a person’s surname;⁴⁴ (2) a person’s sexual lifestyle;⁴⁵ (3) a person’s clothing;⁴⁶ (4) a person’s medical treatment;⁴⁷ (5) a person’s sexual integrity;⁴⁸ and (6) a person’s physical integrity.⁴⁹ Nevertheless, as with its complement, Strasbourg has not provided sufficient guidance to national courts and legislatures as to what other sorts of matters might later be found to involve private life under this second component.

* * *

In spite of the case-by-case approaches noted above, or perhaps because of them, some Court opinions from Strasbourg have recently taken steps towards providing a better framework for deciding the *privacy* component cases--namely by gauging the applicant’s reasonable expectations. A review of that trend is covered in the next section.

II. THE EXPLICIT APPEARANCE OF A “REASONABLE EXPECTATION OF PRIVACY” TEST IN THE COURT’S JURISPRUDENCE AS A BASIS FOR DEFINING THE *PRIVACY* COMPONENT OF PRIVATE LIFE

The reasonable-expectations test has appeared as a basis for assessing the *privacy* component of private life in five reported judgments of the Court, starting in 1997 and continuing through 2004. As will be seen in the sections that follow, the test features prominently in the first and fifth cases, with some members of the Court even writing separately in the fifth case to advocate its use. However, the test appears more as background noise in the others, perhaps due to unease or unfamiliarity in its use. Nevertheless, it can be said that the Court appears eager to pursue or at least explore reasonable expectations as the benchmark in future cases. In my view, this is an area ripe for development in general and for expansion into *personal choice* cases.

⁴³ No. 6959/75, at ¶ 55, 3 EHRR 244 (12 July 1977); *see also* Doswald-Beck, *supra* note 22, at p. 309 (“In assessing the Commission’s attempt at definition, it would seem that the most recent attempt, that is, respect for the development of personality, could be interpreted so as to encompass most situations relating to what would normally be seen as private life, thus making it flexible enough.”); Karen Reid, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS p. 323 (1998) (“The concept stands for the sphere of immediate personal autonomy.”).

⁴⁴ *See Stjerna v. Finland*, No. 18131/91, A-299-B, 24 EHRR 94 (25 Nov. 1994) (applicant sought to change his last name); *Burghartz v. Switzerland*, No. 16213/90, A-280-B, 18 EHRR 101 (22 Feb. 1994) (same).

⁴⁵ *See Dudgeon v. UK*, No. 7525/76[PC], A-45, 4 EHRR 149 (23 Sept. 1981) (applicant affected by laws criminalizing his homosexual lifestyle).

⁴⁶ *See McFeeley v. UK*, No. 8317/78, 3 EHRR 161 (15 May 1980) (prisoner applicant required to wear a certain prison uniform).

⁴⁷ *See Herczegfalvy v. Austria*, No. 10533/83, A-244, 15 EHRR 437 (24 Sept. 1992) (applicant forced to receive medical treatment).

⁴⁸ *See X. & Y. v. Netherlands*, No. 8978/80, A-91, 8 EHRR 235 (26 Mar. 1985) (applicant’s mentally handicapped daughter sexually assaulted, but national law provided no remedy).

⁴⁹ *See Costello-Roberts v. UK*, No. 13134/87, A-247-C, 19 EHRR 112 (25 Mar. 1993) (applicant corporally punished in an educational setting without redress).

The five judgments are discussed in chronological order.

A. *Halford v. The United Kingdom*

The phrase “reasonable expectation of privacy” first appeared in a Strasbourg opinion in 1997 in the case of *Halford v. The United Kingdom*.⁵⁰ The applicant, Ms. Alison Halford, had worked in 1983 as an Assistant Chief Constable with the Merseyside police and was at the time the highest-ranking female police officer in the United Kingdom. Over the following seven years, Ms. Halford applied several times, unsuccessfully, for a promotion to the rank of Deputy Chief Constable. Feeling that the denials were based on a discriminatory motive, she brought a claim against the Chief Constable, among others, for gender discrimination. She also accused certain members of the Merseyside Police Authority of having launched a campaign against her in retaliation for her bringing the complaint.⁵¹

Most important to our analysis here, however, is the fact that Ms. Halford further alleged that “calls made from her home and her office telephones were intercepted for the purposes of obtaining information to use against her in the discrimination proceedings.”⁵² Because the Government conceded that Article 8 would cover home telephone interceptions, the Court undertook no applicability analysis in that regard.⁵³ Instead, the fight over the applicability of Article 8 centered on the workplace interceptions.

Ms. Halford argued that the calls she made from her office fell within the scope of private life and correspondence under Article 8(1). The Government countered, however, that those telephone calls

fell outside the protection of Article 8 . . . because she could have had
no reasonable expectation of privacy in relation to them. At the

⁵⁰ No. 20605/92, ECHR 1997-III, 24 EHRR 523 (25 June 1997). However, the “reasonable expectation of privacy” test is often said to have originated in the United States Supreme Court’s 1967 decision in *Katz v. United States*, a case dealing with an individual’s right under the Fourth Amendment to the United States Constitution to be free from unreasonable government searches and seizures. 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Not unlike the Convention on Human Rights, the Fourth Amendment states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Constitution Amend. IV. In *Katz*, the Supreme Court departed from earlier cases that focused on the presence of the items listed in the Amendment as demonstrating the applicability of the Amendment and held that those seeking to invoke the Amendment must instead show an actual and reasonable expectation of privacy in the place or object that the government has observed, searched or seized. *See id.* at pp. 348-359, 361. It also bears noting that several jurisdictions within the United States have also used the “reasonable expectation of privacy” test as an element of the tort of intrusion of privacy. *See, e.g., Pearson v. Dodd*, 410 F.2d 701, p. 704 (D.C. Cir. 1970); *Shulman v. Group W productions, Inc.*, 18 Cal. 4th 200, pp. 208-210 (1998). I have found much of the literature that exists in the United States on these two subjects to be useful in preparing this Paper.

⁵¹ *See Halford*, *supra* note 50, at ¶¶ 9-12.

⁵² *Id.* at ¶ 17.

⁵³ The Court ultimately found no violation of Article 8 with respect to the alleged home interceptions because there was insufficient evidence to suggest that the home tapping actually occurred. In other words, there was no interference.

hearing before the Court, counsel for the Government expressed the view that an employer should in principle, without the prior knowledge of the employee, be able to monitor calls made by the latter on telephones provided by the employer.⁵⁴

Although the Court ultimately disagreed with the Government's conclusion that Article 8 had not been implicated, it did adopt the Government's proposed "reasonable expectation of privacy" test. The Court began by noting that phone calls made from business premises can in certain circumstances be covered by private life and correspondence. The Court then went on to state:

There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, *have had a reasonable expectation of privacy for such calls*, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in the response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case⁵⁵

Not surprisingly, the Court then held that the "conversations held by Ms Halford on her office telephones fell within the scope of the notion[] of 'private life' and 'correspondence.'"⁵⁶ Having found no proper justification for the interference, the Court concluded that a violation of Article 8 had occurred.⁵⁷

The decision is remarkable, of course, for its first use of the "reasonable expectation of privacy" test. But it also highlights an issue that will be discussed in Part III.D of this Paper: Should the reasonable-expectations test be used to judge solely the issue of private life or should it also be used to judge all of the other rights contained in Article 8 (including home, family life and correspondence)?⁵⁸ I raise this issue here because in *Halford* the Court (and Government, for that matter) seemed to sweep the applicability of both private life and correspondence under the rubric of reasonable expectations. There are two possible explanations for their imprecision. Perhaps it was intentional and, by melding private life and correspondence together in their analyses, the Government and the Court intended the reasonable-expectations test to govern the applicability of private life *and* correspondence. The imprecision may have been inadvertent, however, with the Court intending that reasonable expectations govern private life only, and that correspondence continue to be

⁵⁴ *Id.* at ¶ 43 (emphasis added).

⁵⁵ *Id.* at ¶ 45 (emphasis added).

⁵⁶ *Id.* at ¶ 46.

⁵⁷ *See id.* at ¶ 51.

⁵⁸ *See infra* Part III.D.

analyzed separately.⁵⁹ In any event, as will be explained further along in this Paper, if the Court elects to adopt reasonable expectations as its benchmark in the future, it will have to describe clearly whether the test is intended to pertain solely to private life or whether (and how) it will be used with respect to the other rights in Article 8.

B. *P.G. & J.H. v. The United Kingdom*

It was not until four years later that the Court again mentioned the reasonable-expectations test, this time in *P.G. & J.H. v. The United Kingdom*,⁶⁰ a case concerning, among other things, whether the police can covertly record a suspect’s voice in order to obtain a voice sample while the suspect is being detained at the police station.

The *P.G. & J.H.* case began when the police received a tip that one of the applicants, P.G., and another person, B., were planning to rob a cash-collection van on or around 2 March 1995. In an effort to thwart the robbery, the police installed a covert listening device in a sofa in B.’s apartment. The police were particularly interested in using the surveillance information to attempt to identify an unknown third member of the conspiracy (later determined to be the second applicant in the case, J.H.). Over the next several days, the police recorded several conversations between B. and the other conspirators and photographed several persons going in and out of the apartment, including P.G. and J.H. But before the police could link the applicants (particularly J.H.) to the voices on the tapes, B. and the others discovered the bug. The men abandoned the apartment, and the robbery did not take place at the prescribed time.⁶¹

Soon thereafter, the police arrested the applicants for driving a stolen automobile. Both applicants refused to answer any questions or to provide the police with voice samples. So in order to obtain the speech samples they so desperately wanted, the police installed covert listening devices on the police officers that were present when the applicants were charged and in the applicants’ cells. The applicants were then recorded, without their knowledge or permission, during the charging procedure and while incarcerated.⁶² The evidence obtained permitted the police to match the applicants’ voices to the voices featured on the surveillance audiotapes.⁶³

After being tried and convicted for conspiracy to commit armed robbery, largely by use of the tapes and voice samples at trial, the applicants’ complaint found its way to Strasbourg. The issue we are most concerned with here is the use of the covert listening devices at the

⁵⁹ If this latter explanation is the more plausible, I query why the Court even discussed reasonable expectations in the first place given that the Court could have avoided the private-life issue altogether and instead relied solely on the notion of correspondence in order to reach the same result. See *A. v. France*, *supra* note 11, at ¶¶ 33-36 (holding that a telephone call constitutes correspondence under Article 8 regardless of whether its contents are of a private matter, and then finding it unnecessary to analyze the question under private life).

⁶⁰ No. 44787/98, ECHR 2001-IX (25 Sept. 2001).

⁶¹ See *id.* at ¶¶ 8-14.

⁶² Some of the conversations recorded in the cells were between J.H. and his solicitor and were therefore not used against the applicants at trial.

⁶³ See *id.* at ¶¶ 15-17.

police station, as it is in that context that the “reasonable expectation of privacy” test arose.⁶⁴ The applicants submitted that there was a breach of privacy because they did not know or have reason to suspect that their conversations were being recorded. Rather, they believed that they were speaking only to the person they were addressing.⁶⁵

The Government countered that private life was not involved because the “recordings were not made to obtain any private or substantive information,”⁶⁶ but were instead made to obtain a voice sample of the applicants. Most importantly, the Government argued that the “aural quality of the applicants’ voices was not part of private life but was rather a public, external feature.”⁶⁷ The Government further reminded the Court that some of the recordings were made while the applicants “were being charged--a formal process of criminal justice, in the presence of at least one police officer.”⁶⁸ In light of the foregoing circumstances, the Government urged the Court to find that the applicants had “no expectation of privacy.”⁶⁹

The Court rejected the Government’s view. After summarizing some of the categories of matters that have been protected under private life in the past, the Court stated:

There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, *a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.* [For example,] [a] person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character.⁷⁰

But the Court then seemed to stress that the important issue was whether and how the applicants’ information was *processed*:

Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or

⁶⁴ The applicants also complained about the legality of the bug at B.’s flat and the use of information obtained from a telephone company regarding B.’s use of his telephone. However, the Government did not contest the applicability of private life in those matters.

⁶⁵ *See id.* at ¶ 52.

⁶⁶ *Id.* at ¶ 54.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 57 (emphasis added).

covert method.⁷¹ The Court has referred in this context to the Council of Europe’s Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data . . . and whose purpose is “to secure in the territory of each Party for every individual . . . respect for his rights and fundamental freedoms, and in particular his right to privacy, *with regard to automatic processing of personal data relating to him*,” such data being identified as “any information relating to an identified or identifiable individual.”⁷²

Turning then to the case before it, the Court stated that the recordings taken for use as voice samples fell within the scope of private life. “A permanent record has . . . been made of the person’s voice and it is subject to a process of analysis directly relevant to identifying that person in the context of other personal data.”⁷³ The Court concluded that “[t]hough it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants.”⁷⁴

It is a little unclear from the Court’s opinion whether it intended the fact of personal data processing to be the dispositive issue or simply another factor to be considered in addition to or as part of the analysis of the applicant’s reasonable expectations of privacy. It would seem to me that some species of the latter reading is the correct one as otherwise the Court’s discussion of reasonable expectations would have been superfluous. But that then begs the follow-up question of how reasonable expectations and processing relate to each other as criteria. Are they separate, independent criteria or is processing subsumed within the other? An argument can certainly been made that they are independent criteria, but I am more

⁷¹ At this point in the opinion, the Court cites the decision of *Rotaru v. Romania*, No. 28341/95[GC], ECHR 2000-V (4 May 2000), which held that admittedly-public information about a person’s political activism nevertheless falls within the scope of private life if it is later systematically collected and stored in files held by governmental authorities. Judge Bonello dissented, arguing that activities that are by their very nature public, and which are actually nourished by publicity, are well outside the protection of Article 8. *See id.* at ¶ 3 (Bonello, J., dissenting). He further stated:

In what way does the storage of records relating to the eminently public pursuits of an individual violate his right to privacy? Until now the Court has held, unimpeachably in my view, that the protection of Article 8 extends to confidential matters, such as medical and health data, sexual activity and orientation, family kinship and, possibly, professional and business relations and other intimate areas in which public intrusion would be an unwarranted encroachment on the natural barriers of self. Public activism in public political parties has, I suggest, little in common with the *ratio* which elevates the protection of privacy into a fundamental human right.

Id. at ¶ 6.

⁷² *P.G. & J.H.*, *supra* note 60, at ¶ 57 (emphasis added); *see also* Lee A. Bygrave, *Data Protection Pursuant to the Right of Privacy in Human Rights Treaties*, 6 INT’L J. L. & INFO. TECH. 247 *passim* (1998) (discussing the extent to which Article 8 embraces the principles and guarantees found in data protection laws).

⁷³ *P.G. & J.H.*, *supra* note 60, at ¶ 59.

⁷⁴ *Id.*

inclined to favor the other approach, primarily because I cannot imagine a situation where the Court would hold that private life has been implicated because information was processed even though the information related to matters in which no reasonable person could have an expectation of privacy. As I see it, data processing is simply a factor to consider, among others, in determining whether an expectation was reasonable.

It is thus unfortunate that the Court did not frame its conclusion within the rubric of reasonable expectations. Perhaps this is because the Court felt uncomfortable stating, given the public nature of people's voices and the location where the voice samples were taken, that the applicants had a reasonable expectation of privacy in their voices. Yet the Court could have made such a statement had it recognized that expectations of privacy can be *partial*.⁷⁵ Within the context of the reasonable-expectations test, it could be said that the applicants in *P.G. & J.H.* had a reasonable, partial expectation of privacy in the sound of their voices. Although a reasonable person might expect their voice to be heard in normal conversation, one could nevertheless reasonably expect to retain at least some degree of privacy in that voice, perhaps expecting that at most only the people who are present (and whom the speaker is aware of) might contemporaneously hear and recognize their voice. A reasonable person under the circumstances would probably not foresee the sort of electronic recording and analysis (*i.e.*, data processing) that occurred in *P.G. & J.H.*

C. *Peck v. The United Kingdom*

The Court next encountered the "reasonable expectation of privacy" issue in *Peck v. The United Kingdom*.⁷⁶ The case involved the televising and publication of the aftermath of a person's suicide attempt. The Court relied heavily on the reasoning of *P.G. & J.H.* and therefore also highlighted the importance of processing of information as an important factor in determining the applicability of Article 8. However, as with *P.G. & J.H.*, it too can be read as continuing to endorse a reasonable-expectations approach.

The applicant, Geoffrey Peck, was suffering from depression as a result of personal and family circumstances. One late night during August 1995, he walked alone to a central road junction in the center of the city of Brentwood and attempted suicide by cutting his wrists with a kitchen knife. He stayed at the junction for a time and leaned over a railing facing the traffic with the knife in his hand. Unbeknownst to Mr. Peck, however, was the fact that the city was contemporaneously observing and recording his actions through a camera mounted on the traffic island in front of the junction. Although the camera did not capture him actually slitting his wrists, it did show him at the junction in possession of the knife. Police arrived at the scene shortly thereafter, took the knife from Mr. Peck, and then gave him medical assistance. Ultimately, Mr. Peck was released and no charges were filed.⁷⁷

⁷⁵ This is an important point that I will come back to later in Part III.B *infra*.

⁷⁶ No. 44647/98, ECHR 2003-I, 36 EHRR 719 (28 Jan. 2003).

⁷⁷ See *id.* at ¶¶ 9-11.

But the story does not end there. The city council issued a press release touting the fact that its camera surveillance system had helped prevent a “potentially dangerous situation.”⁷⁸ The release specifically noted that

an individual had been spotted with a knife in his hand, that he was clearly unhappy but not looking for trouble, that the police had been alerted, [and] that the individual had been disarmed and brought to the police station where he was questioned and given assistance for his problems.⁷⁹

The press release also included two still photographs of Mr. Peck holding the knife (his face was not digitally masked) that were taken from the camera footage. The story and the photographs of Mr. Peck eventually made their way into local newspapers with the permission of the city and ultimately appeared, along with video footage of the event (also obtained by permission from the city), on a BBC television show called *Crime Beat*.⁸⁰ Consequently, Mr. Peck complained to a number of domestic adjudicative bodies, alleging an unwarranted infringement of his privacy, but his claims were all rejected.⁸¹

Bringing his claims before the Court, Mr. Peck argued that the disclosure by the city of the relevant footage and the subsequent publication and broadcasting constituted a disproportionate interference with his right to respect for his private life in violation of Article 8. One of the principal issues in the case was whether, in light of the location of the activities and the circumstances of the filming, Mr. Peck’s private life had even been implicated. The U.K. government argued that it had not because Mr. Peck’s actions were allegedly already in the public domain. Specifically, the Government argued that the “[d]isclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant’s original conduct and render it more private.”⁸² Mr. Peck countered that his private life was involved because the relevant footage related to an attempted suicide and he was unaware that he was being filmed.

The Court sided with Mr. Peck and found that private life had in fact been implicated. The Court began by quoting verbatim from the passage in *P.G. & J.H.* that discusses the “reasonable expectation of privacy” test. It then discussed factors that are important in determining whether public activities become private for purposes of Article 8 that, like *P.G. & J.H.*, basically rely on whether and how the public activities are processed (again, a step consistent with the concept of partial expectations of privacy mentioned in my discussion of *P.G. & J.H.*):

The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual’s

⁷⁸ *Id.* at ¶ 13.

⁷⁹ *Id.*

⁸⁰ Although the *Crime Beat* program masked Mr. Peck’s face, that masking was inadequate and many of Mr. Peck’s friends and family who saw the program recognized him.

⁸¹ *See id.* at ¶¶ 12-23.

⁸² *Id.* at ¶ 53.

private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations. . . . [¶] [Also important are whether the data] remain anonymous in that no names [are] noted down, . . . [whether] the personal data . . . [are] entered into a data-processing system . . . [and whether the data] [have] been made available to the general public or [will] be used for any other purpose.⁸³

Analyzing the facts before it, the Court made much of the fact that the newspaper stories about the applicant were “distributed in the applicant’s locality to approximately 24,000 readers” and that the video footage was broadcast “locally to approximately 350,000 people and [on] the BBC broadcast nationally.”⁸⁴ The Court then concluded that private life was involved because “the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation . . . and to a degree surpassing that which the applicant could possibly have *foreseen* when he walked in [the city on the date in question].”⁸⁵

Despite its apparent emphasis on data processing, it seems to me (once again) that the Court is essentially stating that the disclosure of the footage invaded Mr. Peck’s reasonable expectation of privacy. A reasonable person might expect that what Mr. Peck did would be a private matter to a certain extent (visible, perhaps, only by people who happened to be passing by). However, one would not expect or foresee the sort of use and disclosure (*i.e.*, data processing) that occurred. So although Mr. Peck cannot claim an absolute expectation of privacy, he can claim a partial one. Of course, it should go without saying that if Mr. Peck had known that a BBC television crew was filming his actions, he could not have reasonably expected that his actions would be private.⁸⁶

D. *Perry v. The United Kingdom*

Similar in facts and outcome to *P.G. & J.H.*, was the Court’s next decision in *Perry v. The United Kingdom*,⁸⁷ a case involving the covert videotaping of a suspect at a police station. There, the applicant was suspected of robbing several mini-cab drivers. The police

⁸³ *Id.* at ¶¶ 59, 61.

⁸⁴ *Id.* at ¶ 62.

⁸⁵ *Id.* (emphasis added).

⁸⁶ This is as good a place as any to raise a point regarding what different societies perceive are reasonable expectations. Whereas the European Court of Human Rights essentially found a reasonable expectation of privacy in *Peck*, I find it doubtful, based on my own non-scientific perception, that the result would be the same in the United States. Television viewers in the United States are bombarded with countless shows that use footage obtained from police and safety cameras. We have grown so accustomed to seeing people on camera in such a manner that I think most people would say that, *given the openness of his activity*, Mr. Peck could have had no reasonable expectation of privacy in his case (even a partial one), regardless of how widely the video was disseminated.

⁸⁷ No. 63737/00, 39 EHRR 76 (17 July 2003).

subsequently arrested the applicant and asked him to participate in an identification parade. Despite agreeing to appear several times for the lineup, the applicant reneged.⁸⁸

Because the prosecution’s case rested almost entirely on the ability of the witnesses to identify the perpetrator, the police decided to covertly videotape the applicant after luring him to return to the police station. The police used a camera that was already in place in the custody suite (an area where police personnel and other suspects came and went on a regular basis) and which was in the normal course of business kept running at all times. However, because of the special needs in this case, an engineer adjusted the camera to ensure that it took clearer pictures during the applicant’s visit. After the applicant was videotaped, “[a] compilation tape was prepared in which eleven volunteers imitated the actions of the applicant as captured on the covert video. This video was shown to various witnesses of the armed robberies, of whom two positively identified the applicant.”⁸⁹ The applicant was then tried and convicted based in large part on the identifications.

After exhausting his domestic remedies, the applicant complained in Strasbourg of an Article 8 violation, specifically alleging that the filming in the police station infringed his right to private life. He made much of the fact that the camera was running at a different speed to produce a clearer image and that he did not know of the camera. Importantly, he further argued that even if he had known of the camera, he could not have known that it would be used for identification purposes.⁹⁰

The Government countered that the images related to public (not private) matters, that the video camera was easily visible, and that therefore the applicant could not have had a reasonable expectation of privacy in such an environment. The Government also argued that the footage was not processed given that the “section concerning the applicant was simply extracted and put with footage of the eleven volunteers and there was no public disclosure or broadcast of the images.”⁹¹

The Court disagreed and found that private life had been implicated. As it had in the past, the Court first stated that “a person’s reasonable expectations as to privacy is a significant though not necessarily conclusive factor.”⁹² But it also then cited the relevance of processing. Turning to the merits, the Court stated as follows:

[T]he normal use of security cameras *per se* whether in the public street or on premises, such as shopping centres or police stations where they serve a *legitimate* and *foreseeable* purpose, do not raise issues under Article 8 § 1 of the Convention. Here, however, the police regulated the security camera so that it could take clear footage of the applicant in the custody suite . . . to show to witnesses for the purposes of seeing whether they identified the applicant The question is whether this use of the camera and footage constituted a

⁸⁸ See *id.* at ¶¶ 8-12.

⁸⁹ *Id.* at ¶ 15.

⁹⁰ See *id.* at ¶ 30.

⁹¹ *Id.* at ¶ 33.

⁹² *Id.* at ¶ 37.

processing or use of personal data of a nature to constitute an interference with respect for private life. [¶] . . . This ploy adopted by the police went *beyond the normal or expected use* of this type of camera, as indeed is demonstrated by the fact the police were required to obtain permission and an engineer had to adjust the camera. The permanent recording of the footage and its inclusion in a montage for further use may therefore be regarded as the processing or collecting of personal data about the applicant.⁹³

Again, what is remarkable about this case is that, despite the stated allegiance to processing as being the key factor, the analysis of the Court seems more akin to one involving degrees of reasonable expectations of privacy. This is apparent in the Court's use of the terms "legitimate," "foreseeable," "normal," and "expected." A reasonable person might expect their face to be captured on a security camera in a police station, but they could nevertheless reasonably expect to retain at least some degree of privacy in that image, perhaps expecting that at most the image would only be used if, for example, there was an incident in the area requiring a review of the tape. As a reasonable person would not foresee the sort of use that occurred here, it can be said that the applicant reasonably retained an expectation of privacy.

E. *von Hannover v. Germany*

The Court's most recent and arguably significant decision in this area is *von Hannover v. Germany*,⁹⁴ a case involving the often-occurring conflict between Princess Caroline of Monaco and the paparazzi. There, the Court ruled that the publication of certain images of Princess Caroline implicated her private life. The judgment is notable for its explicit reinvigoration of reasonable expectations (and the downplaying of processing alone) as the benchmark for future cases.

As any reader can likely surmise, especially those situated in Europe, Princess Caroline has been hounded by the paparazzi for nearly her entire life. In the last eleven years or so, she has tried in vain to prevent the publication of images that she felt involved her private life. In her case before the Court, she concentrated her efforts on a series of tabloid publications in Germany that contained, among other things, photos of her and her supposed boyfriend sitting in a restaurant; her canoeing, bicycling, shopping, and skiing; and her at the Monte Carlo Beach Club, dressed in a swimsuit, tripping over an obstacle and falling down.⁹⁵ Princess Caroline had previously sought to enjoin these publications in the German courts but was unsuccessful. The domestic courts essentially held that Princess Caroline's privacy rights were diminished because of her role as a public figure.

The European Court of Human Rights rejected that position, at least insofar as it could be said the Princess had a reasonable expectation of privacy. The Court stated:

There is . . . a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life." [¶]
The Court has also indicated that, in certain circumstances, a person

⁹³ *Id.* at ¶¶ 40-41 (emphasis added).

⁹⁴ No. 59320/00 (24 June 2004).

⁹⁵ *See id.* at ¶¶ 9-17.

has a “*legitimate expectation*” of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant “would have had a *reasonable expectation of privacy* for such calls. [Citing *Halford*]. [¶] As regards photos, . . . the Commission [also] had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.”⁹⁶

The Court then drew its conclusion, albeit with no analysis whatsoever, that “[i]n the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life”⁹⁷ and that “she should, in the circumstances of the case, have had a ‘legitimate expectation’ of protection of her private life.”⁹⁸ Notably, no mention was made of the data-processing test discussed in the three previous cases. The significance of the Court’s omission remains to be seen, but an argument can certainly be made that the opinion strengthens the view that reasonable expectations is the determinative test and data processing is but a factor to consider within the scope of that test.

The Court spent the majority of its time discussing whether the Government was justified in its failure to provide Princess Caroline with a means (in Germany’s domestic law and court system) to stop the publications. The balance the Court sought to strike in this positive obligation case was the protection of private life against the freedom of expression. The Court stressed “that a fundamental distinction [must] be made between reporting facts--even controversial ones--capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.”⁹⁹ The Court ultimately concluded that private life triumphed in this case because the photos at issue did not relate to Princess Caroline’s official functions but instead dealt exclusively with her private life.¹⁰⁰

More was said about the reasonable-expectations test in the concurring opinions of Judges Barreto and Zupančič, both of whom doubted that all of the photographs should fall within the realm of private life. Judge Barreto stated that, in his view, “whenever a public figure has a ‘legitimate expectation’ of being safe from the media his or her right to private life prevails over the right to freedom of expression or the right to be informed.”¹⁰¹ He then parted ways with the majority in his application of the test:

The majority attach importance, for example, to the fact that the photos at the Monte Carlo Beach Club had been taken secretly. I do

⁹⁶ *Id.* at ¶¶ 50-52 (emphasis added). The Court appears to use the terms “reasonable expectation” and “legitimate expectation” interchangeably.

⁹⁷ *Id.* at ¶ 53.

⁹⁸ *Id.* at ¶ 78.

⁹⁹ *Id.* at ¶ 63.

¹⁰⁰ *See id.* at ¶ 64.

¹⁰¹ *Id.* (Barreto, J., concurring).

not dispute the need to take account of the fact that the photos were taken from a distance, particularly if the person was somewhere they could legitimately believe did not expose them to public view. However, the beach club swimming pool was an open place frequented by the general public and, moreover, visible from the neighboring buildings. Is it possible in such a place to entertain a reasonable expectation of not being exposed to public view or to the media? I do not think so.

I believe that this same criterion is valid for photos showing the applicant in other situations in her daily life in which she cannot expect her private life to be protected. I have in mind the photos of her doing her shopping. However, other photos--for example those of the applicant on horseback or playing tennis--were taken in places and circumstances that would call for the opposite approach.¹⁰²

Judge Zupančič was even stronger in his advocacy for the expectation test:

It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.

The question here is how to ascertain and assess this balance. I agree with the outcome of this case. However, I would suggest a different determinative test: the one we have used in *Halford v. United Kingdom* . . . which speaks of “reasonable expectation of privacy.” [¶] The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in *Halford* do not prevent us from employing the same test in cases such as the one before us.

The dilemma as to whether the applicant here was or was not a public figure, ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. Perhaps this is what Judge Cabral Barreto has in mind [¶] . . . [R]easonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones.¹⁰³

Aside from its revitalization of the reasonable-expectations test, the *von Hannover* decision also highlights the fact that the determination of what is reasonable may “give rise to differences of opinion” among judges.¹⁰⁴ Thus, if reasonable-expectations is going to be the benchmark for future cases, and the Court is to maintain consistency and credibility in its decisions, it will have to develop a more structured framework by which to proceed. It is the subject of the next part of this Paper to suggest a possible framework.

¹⁰² *Id.* (Barreto, J., concurring).

¹⁰³ *Id.* (Zupančič, J., concurring).

¹⁰⁴ *Id.* (Barreto, J., concurring).

III. ADOPTING AND DEVELOPING REASONABLE EXPECTATIONS AS THE RULE FOR DETERMINING WHETHER PRIVATE LIFE IS IMPLICATED UNDER ARTICLE 8

The preceding sections have demonstrated that whereas the Convention tribunals initially defined private life in a piecemeal fashion, and without reference to any general framework, some opinions of the Court have now, in the last seven years, floated a trial balloon based on a person’s reasonable expectations of privacy. Although the test is as yet underdeveloped in the Court’s jurisprudence, I believe the Court is on the right course and that the underdevelopment is understandable at this stage. In this Part, I propose that the Court should embrace such a reasonable-expectations test in all future *privacy* component cases and expand its implementation to include *personal choice* cases as well. As such, I have tried to re-construct the reasonable-expectations test to include both categories of private life. In the next several sections, I offer a general statement of such a test, suggestions on how to correctly frame the applicant’s complaint, and guidelines on how to judge the reasonableness of an expectation.

A. Reasonable Expectations as the Benchmark for Private Life

Consider the following proposed statement as the standard to govern future cases in which the applicability of private life under Article 8(1) is in question:

A public authority may not without proper justification under Article 8(2) interfere with or fail to respect matters in which a person has a reasonable expectation of privacy or personal choice. The expectation must be judged against what a free and democratic society is prepared to recognize as reasonable, but without considering, at this Article 8(1) stage of the analysis, the State’s justifications, motives or goals in interfering or choosing not to act.

B. Framing the Applicant’s Complaint

In assessing the reasonableness of a person’s claim that his or her private life has been implicated, it is first important to frame the applicant’s purported expectation correctly. Although this may seem an obvious point, I raise it because the framing of the expectation is more likely in my proposal, than in the Court’s current approach, to affect the outcome of a given case. The key to correctly framing the expectation is to include as many specific and salient facts as possible, rather than presenting the issue in a more abstract way. Too few facts may lead the Court to recognize an expectation as reasonable that it should not have or reject an expectation that it should have found reasonable. Aside from the mantra that the Court should consider all the relevant circumstances, particular attention should be paid to:

1. The type, nature, and frequency of the intrusion;¹⁰⁵
2. The location of the intrusion;
3. The intruder; and

¹⁰⁵ Such as the type of processing of personal data, as was highlighted in *P.G. & J.H., Peck and Perry*.

4. What private or personal-choice matter is allegedly involved.

The importance and consequences of factual specificity are best demonstrated by example. Take, for instance, the common situation where a government regulation states that when a person brings a lawsuit the case will be assigned to a particular judge and the litigant must present all arguments to that judge only, barring some showing of bias or impropriety. Now suppose that the litigant challenges this law on the ground that he believes that the decision of whom to speak to is a decision that ordinarily would be of personal choice, and that therefore the government, by not permitting him to speak and present his case to another judge, has interfered with that right. It seems like an absurd case. But if the expectation is framed without sufficient facts, *i.e.*, by posing it simply as whether it would be reasonable to state that it is ordinarily a matter of personal choice to decide whom to speak to and whom not to, then the Court would undoubtedly have to find the expectation to be reasonable. However, as more facts are added, *e.g.*, whether it would be reasonable for a person to expect that he had the personal choice of deciding which judge to present his arguments to, it becomes less likely that the Court would adjudge the expectation to be reasonable. Of course, it should be repeated that the analysis I speak of here relates solely to the applicability of Article 8(1), and that a complaint that appears absurd on its face may still be dismissed on the basis of a government's justification under Article 8(2).

Factual specificity and careful construction of the issues also are particularly important in *privacy* cases because sometimes, as has been alluded to earlier, reasonable expectations can be partial. "There are degrees and nuances to societal recognition of our expectations of privacy,"¹⁰⁶ and the rule should not be that in order for an expectation of privacy to be reasonable that expectation must be of absolute or complete privacy.¹⁰⁷

This point was perhaps best demonstrated by the California Supreme Court in its decision in *Shulman v. Group W Productions, Inc.*,¹⁰⁸ a case involving the tort of intrusion of privacy (a claim that requires as an essential element that the plaintiff have a reasonable expectation of privacy). There, the plaintiffs were injured when their car overturned in an accident. A medical rescue helicopter crew arrived on site, accompanied by a video cameraman employed by a television producer. The cameraman filmed the entire rescue, including the nurse and medics' efforts to care for the accident victims. Because the producer had fitted the rescue nurse with a small microphone, unbeknownst to the victims, he was able to record the nurse's conversation with the plaintiffs. The video footage was then broadcast months later, without the plaintiffs' permission, on a documentary television show called *On Scene: Emergency Response* (not unlike in the *Peck* case).¹⁰⁹ The plaintiffs sued for intrusion of privacy, among other claims.

In finding that the plaintiffs could have had a reasonable expectation of privacy in their conversations with the rescue personnel,¹¹⁰ the Court held that "mass media videotaping [and

¹⁰⁶ *Sanders v. ABC*, 20 Cal. 4th 907, p. 916 (1999).

¹⁰⁷ *See id.*

¹⁰⁸ 18 Cal. 4th 200 (1998).

¹⁰⁹ *See id.* at p. 209.

¹¹⁰ And that therefore the issue must be presented to the jury at trial (rather than summarily dismissed as the trial court had done).

surreptitious recording] may constitute an intrusion even when the events and communications recorded were visible and audible to some limited set of observers at the time they occurred.”¹¹¹ The California Supreme Court later explained its holding as follows:

[We have never stated] that an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of *absolute* or *complete* privacy. Indeed, . . . a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to confidentiality of the communication’s contents. “While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device. [¶] . . . [S]uch secret monitoring denies the speaker an important aspect of privacy of communication--the right to control the nature and extent of the firsthand dissemination of his statements.”¹¹²

As I have already recounted elsewhere, the European Court of Human Rights has already implicitly accepted such a partial-expectation approach, particularly in the cases where the Court focuses on the facts relating to how the matter is processed. This is the right approach, and the Court should ensure that it collects sufficient facts and properly frames the applicants’ expectations in future cases to permit it to recognize reasonable, partial expectations of privacy.¹¹³

A final word should also be said about the consequences of correctly framing the expectation as involving either the *privacy* or *personal choice* components. Both the parties and the Court should be careful in this regard, as the placement of an issue in a particular

¹¹¹ *Sanders*, *supra* note 106, at p. 915 (summarizing its holding in *Shulman*).

¹¹² *Id.* (quoting *Shulman*); *see also Walker v. Darby*, 911 F.2d 1573, 1579 (11th Cir. 1990) (“We agree that there is a difference between a public employee having a reasonable expectation of privacy in personal conversations taking place in the workplace and having a reasonable expectation that those conversations will not be intercepted by a device which allows them to be overheard inside an office in another area of the building. . . . [¶] . . . The [workstation] was located in an area shared with other workers. But while Walker might have expected conversations uttered in a normal tone of voice to be overheard by those standing nearby, it is highly unlikely that he would have expected his conversations to be electronically intercepted and monitored in an office in another part of the building.”).

¹¹³ It is interesting to note that had the Court not wanted to recognize a partial expectation of privacy in the *Peck* case, and instead insisted that any expectation of privacy be absolute, it could have rejected the applicant’s claim by framing the expectation differently. Recall that in *Peck* the Court found that private life was implicated where a person was videotaped on a public thoroughfare after having attempted suicide and the tape was disseminated and used by the media. Had the number of salient facts been reduced, and the question been simply stated as whether a person has a reasonable expectation of privacy when engaging in activity on a public street, the outcome in *Peck* would undoubtedly have changed.

category may affect the outcome of a case.¹¹⁴ Take, for example, the cases relating to transsexuality. Many of the applicants' complaints relate to the fact that certain of their public records (*e.g.* birth certificates or driver's licenses) reflect their old gender status, thereby disclosing to the world during ordinary use that the person who appears before them as a male must have at one time been a female (or vice versa). These sorts of cases should be presented as *privacy* expectations. However, if the case has less to do with the secrecy of the gender change and more to do with a person's status as a transsexual *per se*, it must instead be presented as a *personal choice* expectation, otherwise the claim will fail.¹¹⁵

Another example of this issue in practice may be seen in the following hypothetical. Assume a government prohibits individuals from mass-mailing advertisements to the public. Aside from the obvious free speech issue, there also may be a claim for governmental interference with private life under Article 8(1).¹¹⁶ The claim's success will depend on how the expectation is framed. Given that it is doubtful anyone could have an expectation of privacy as to the mailings themselves given that they were mailed to the public, a private life claim based on the *privacy* component would likely fail. However, the outcome would likely change if one asked whether an individual might reasonably expect that the decision to mail the advertisements, and whom to mail them to, would ordinarily be considered a matter of *personal choice*.

C. Judging the Reasonableness

The more difficult question becomes how to take the expectation as framed by the parties and the Court, and then judge whether that expectation is reasonable. I expect this area to cause the Court the most trouble. In my view, the expectation should be judged against what a free and democratic society is prepared to recognize as reasonable,¹¹⁷ but without considering, at this stage of the analysis, the government's justifications, motives or

¹¹⁴ There may, of course, be cases where an expectation could conceivably be framed and succeed under both categories.

¹¹⁵ Similar distinctions may be drawn in cases involving homosexuality, such as was demonstrated in *Norris v. Ireland*, No. 10581/83[PC], A-142, 13 EHRR 186 (26 Oct. 1988), where the openly gay applicant was restricted by laws criminalizing homosexual behavior.

[T]he interference with privacy involved [there] could not consist of activities of the state in disclosing to public view facts which the applicants wished to keep secret. Rather, the Court [held] that respect for private life includes respect for the applicants' sexual life by which, of course, the Court must mean a sexual life of the applicants' own choosing. Thus, "private" must be read to refer not to questions of disclosure or nondisclosure [in this case] but the right to choose certain intimate aspects of one's life, free of government regulation.

Mark Janis, Richard Kay, and Anthony Bradley, *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* p. 278 (2d ed. 2000).

¹¹⁶ And correspondence, for that matter.

¹¹⁷ *Cf. Katz*, *supra* note 50, at p. 361 (Harlan, J., concurring) (stating that, in determining whether a person has a reasonable expectation of privacy for purposes of a search or seizure conducted by law enforcement authorities, the court must inquire whether the individual's expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"). I often shorthand this concept by simply referring to a "reasonable person."

goals in interfering or choosing not to act. Thought of another way, the Court should ask itself whether a free and democratic society would tolerate the sort of intrusion the applicant has suffered (but, again, without reference to the Government’s purported justifications). Two issues bear further elaboration. The first and most obvious is, how can we judge what a free and democratic society would find to be reasonable, and the second relates to why the applicability analysis must be undertaken without considering the State’s purported justifications.

1. A Free and Democratic Society

Determining what expectations a free and democratic society is prepared to recognize as reasonable naturally depends on the definition of a free and democratic society, the threshold for when an expectation becomes reasonable, and the evidence that may be considered to meet that threshold. I discuss each of these topics in the paragraphs that follow and conclude that the Court should consult the practices of the member States--primarily by referring to legal instruments and evidence of social customs--and find among them, at a minimum, an emerging consensus recognizing the right of privacy or personal choice invoked by the applicant.¹¹⁸

It should come as no surprise that the definition of a free and democratic society must be based in large part by reference to the member States of the Convention. By virtue of their membership in the Convention and the Council of Europe, each of the member States accepts, at least in theory, “the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”¹¹⁹ Thus, in determining the reasonableness of an expectation, the Court should look first and foremost to the practices of the contracting governments. Additionally, the Court may, if necessary (such as where the practices of the contracting States are unclear or in conflict), consult the views of non-member countries that share with Europe “a common heritage of political traditions, ideals, freedom and the rule of law.”¹²⁰ I have in mind countries such as Argentina, Australia, and the United States, but there are others as well.

¹¹⁸ The task of finding a consensus by reference to European standards is not new to the Court. As part of the Court’s analysis whether to afford a State a margin of appreciation in the State’s decision to act or not act in a certain way, the Court often looks to whether there is a consensus or common ground among the member States on the issue. *See supra* Part I.B. I have thus, in the pages that follow, cited many authorities that discuss consensus in the context of the margin appreciation doctrine (at least insofar as I felt them compatible with my proposal). It nevertheless remains important to keep in mind that the goals (and, therefore, consequences) of the consensus inquiries differ in each context. With respect to the margin of appreciation, a finding of consensus means the Court will reduce its margin of appreciation, whereas a lack of consensus or common ground, in turn, causes the Court to increase the appreciation. In either case, a consensus (or lack thereof) is just one of many factors the Court will consider in analyzing the government’s justifications. It is not, by itself, dispositive. On the other hand, the purpose of the consensus investigation under the reasonable-expectations test is to determine the existence of a right. Thus, whereas the existence of a sufficient consensus means that private life is implicated, the lack of sufficient consensus means that the applicant’s claim will fail.

¹¹⁹ Statute of the Council of Europe Art. 3.

¹²⁰ Convention on Human Rights Preamble ¶ 5; *see also* Kersten Rogge, *Fact-Finding in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* p. 682 (R. St. J. Macdonald, F.

It logically follows from our definition of “free and democratic society” that any *evidence* of an emerging consensus should come primarily from sources in or associated with the member States and (where necessary) sources in other like-minded countries. The Court should determine the position of each State individually, insofar as possible, and then compare the positions of the States to one another. The two principal factors to consider are:

1. *Legal instruments*, including national constitutions, legislation, regulations, case law and pending reforms; regional treaties; international treaties; and the case law of the Convention institutions; and
2. *Societal norms and customs*, as determined by experts, academic literature, surveys, or anecdotal evidence.¹²¹

This sort of comparative, empirical approach (often absent in the cases)¹²² is necessary given that there must be some methodology or evidence upon which the Court “can base the stated perception of the common will. The evolving standards in the Convention should be informed by empirical evidence [rather than] simply be plucked from the sky by the judge.”¹²³

Matscher, and H. Petzold eds. 1993) (noting that “some interpretations of Convention guarantees also refer to the law and practice of States which, while not parties to the European Convention on Human Rights, nevertheless share the ‘common heritage of political traditions, ideals, freedoms and the rule of law’ invoked in the Preamble to this Convention.”).

¹²¹ In some cases, there may be an internal conflict in a State between a legal instrument and societal customs, thereby making it difficult for the Court to determine the true position of a member State. Whether to favor the legal instrument over the societal customs should depend on the nature and source of the law. A national law may (1) expressly approve of an expectation, by guaranteeing that a person such as the applicant has a right of privacy or person choice in the matter at issue, or (2) expressly reject an expectation, by stating or reflecting that the matter is not one in which the applicant can have an expectation of privacy or personal choice. (Of course, the most likely scenario, given the factual specificity required to frame the expectations, is that no law will speak directly on the issue either way). If there is a law that guarantees a right of privacy or choice in a matter, I would then argue that the law effectively renders within that nation the expectation to be reasonable as a matter of law, regardless of other public or expert evidence to the contrary. However, in cases where the law expressly restricts a right of privacy or choice in a matter, I would argue that at most it creates a presumption that the expectation is unreasonable in that nation, subject to rebuttal by reference to other contrary social customs evidence. The distinction follows from the fact that sometimes, within the national system of a country, it takes longer for a State’s legislation to reflect public, societal consensus.

¹²² See Rudolf Bernhardt, *The Convention and Domestic Law* in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS p. 35 (R. St. J. Macdonald, F. Matscher, and H. Petzold eds. 1993) (“A comparative approach seems to be an absolute necessity in order to find common European principles in the legal orders of these States. [¶] Under these circumstances, it may be astonishing that extensive comparative law analyses cannot be found in the judgments of the Court or the reports of the Commission.”); *Öztürk v. Germany*, No. 8544/79[PC], A-73, 6 EHRR 409 (21 Feb. 1984) (Matscher, J., dissenting) (“In my view, autonomous interpretation would call for comparative studies of a far more detailed nature than those carried out so far by the Convention institutions.”).

¹²³ Paul Mahoney, *Judicial Activism & Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUMAN RIGHTS L.J. 57, pp. 73-74 (1990); see also Yutaka Arai-Takahashi, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF

I recognize that this task will be difficult and time consuming. Indeed, commentators have lamented that the Court lacks the resources to undertake wide-ranging investigations on its own.¹²⁴ Fortunately, it is doubtful that this sort of investigation will have to occur in every case. Many complaints will invoke expectations already recognized by the Court as involving private life, and often the Court will be able to dispose of a case on an alternative basis, such as by finding under paragraph 2 of Article 8 that the State’s actions were not in accordance with law. But in cases where the existence or extent of a consensus on private life or personal choice will be hotly contested, and the issue cannot be avoided, the solution may be found in the Court’s own rules which “are drawn widely to allow the Court considerable scope in deciding how to deal with the investigation of the merits of a complaint.”¹²⁵ The Court should make greater use of its rules permitting the use of Court-appointed experts,¹²⁶ the approval of party-requested *amicus curiae*,¹²⁷ and the appointment of legal aid.¹²⁸ It also bears stressing that much of the work to be undertaken here should not markedly increase the Court’s workload beyond what is already often required under Article 8(2) when determining the margin of appreciation to afford a State. The results of the consensus investigation can thus be used as part of both the inquiry into applicability under paragraph 1 of Article 8 and governmental justification under paragraph 2.¹²⁹

Defining the threshold for a sufficient common ground is a more difficult issue. It is inevitable that in many cases the evidence will demonstrate diversity among the practices of member States.¹³⁰ Should the Court require a true consensus--*i.e.*, all States (or nearly all) must agree that an expectation is reasonable--before the Court can conclude that private life is affected? Or is only an emerging consensus (simple majority) required? For that matter, is only a handful of States enough? This is a problem that the Court already has encountered in the context of Article 8(2) and its application of the margin of appreciation doctrine, and

PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR p. 1957 (2002) (“Vague references to ‘emerging national standards’, which are not empirically verifiable, would undermine [the Strasbourg organs’] credibility and sow the seed of suspicion that they are engaged in an unfounded judicial activism.”).

¹²⁴ See *id.* at p. 76; Harris, *supra* note 4, at pp. 11 & 294.

¹²⁵ Clements, *supra* note 5, at p. 66.

¹²⁶ See E. Ct. H. R. Rule 42 (stating that the Court “may . . . of its own motion, obtain any evidence which it considers capable of providing clarification of the facts of the case[,] . . . decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its tasks[, or] . . . ask any person or institution of its choice to obtain information, express an opinion or make a report on any specific point.”).

¹²⁷ See E. Ct. H. R. Rule 61 (stating that the Court “may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing.”).

¹²⁸ See E. Ct. H. R. Rules 91-96 (stating that Court may in some cases grant free legal aid to the applicant).

¹²⁹ See *supra* note 118.

¹³⁰ In 1973, Jacques Velu wrote that the “scope of the right to respect for private life depends on current manners and custom and varies from place to place, even in Europe. This explains why it is difficult to find a broad definition of this concept in any common legal tradition.” Velu, *supra* note 22, at p. 34. One would hope that the member States of the Convention have moved closer together in the last thirty years.

much can be learned from the cases and literature on this related subject. Those sources demonstrate that although the Court has not expressly adopted an arithmetical threshold,¹³¹ the Convention tribunals have, beginning with their judgment in *Tyrer v. The United Kingdom*, appeared to embrace at a minimum a majority standard and more often a “great majority” standard as the basis for finding a sufficient common ground among the States for purposes of determining the level of appreciation.¹³² This is not surprising, given that it would in a sense be an oxymoron to hold that the shared position of only a handful of States is sufficient to demonstrate a common ground.

Similarly, I think it can be safely said that, in the context of reasonable expectations, there should also be at least an emerging consensus (*i.e.*, a simple majority) among those States that have taken positions on the subject before the Court may recognize an expectation as reasonable. As Professor Helfer has stated with respect to Article 8(2):

While it is impossible to specify for every situation a precise formula for the number of states that must have [taken a position], at a minimum, at least half of the Contracting States should have adopted some form of the rights-enhancing measure in question. This majority rule serves as a minimum baseline against which the tribunals can judge the emergence of genuinely regional norms.¹³³

I question, however, the value in requiring a true consensus before recognizing an expectation as reasonable.¹³⁴ The emerging-consensus standard appears more consistent with the principal interpretive canons of the Convention discussed in Part I.B *supra*. For one, a less rigorous standard makes it easier for the Court to fulfill the principal object and purpose of the Convention, namely to *promote* (and not just maintain) the ideals and values of a free and democratic society.¹³⁵ The Court should not have to wait for decades after a notable trend emerges for a true consensus to arrive before it can act. For similar reasons, the lower threshold makes it simpler for the Court to honor its duty to interpret the Convention dynamically. The emerging-consensus standard also seems more consistent with the concept of autonomous interpretation. If the Court must wait until all, or nearly all, States have taken a certain position, then has the Court not, in effect, essentially incorporated the position of the

¹³¹ See Harris, *supra* note 4, at pp. 295-296 (stating that the “establishment of the existence of a European consensus is not an arithmetical exercise of simply adding up the number of states participating in the practice, a certain number being sufficient to establish the threshold.”).

¹³² See, e.g., *Tyrer v. UK*, No. 5856/72, ¶ 38, A-26, 2 EHRR 1 (25 Apr. 1978); *Marckx, supra* note 12, at ¶ 41; *Dudgeon, supra* note 45, at ¶ 60; *Albert & Le Compte v. Belgium*, Nos. 7299/75 and 7496/76[PC], ¶ 22, A-58, 5 EHRR 533 (10 Feb. 1983); *Norris, supra* note 115, at ¶ 46; *Sutherland v. UK*, No. 25186/94, ¶ 59, 22 EHRR CD 182 (1 July 1997); *L. & V. v. Austria*, Nos. 39392/98 and 39829/98, ¶¶ 47-50, ECHR 2003-I, 36 EHRR 1022 (9 Jan. 2003). *Contra Handyside, supra* note 16, at ¶ 57.

¹³³ Laurence R. Helfer, *Consensus, Coherence and The European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, p. 159 (1993).

¹³⁴ Cf. *Cossey v. UK*, No. 10843/84[PC], A-184, § 5.6.3, 13 EHRR 622 (27 Sept. 1990) (Martens, J., dissenting) (criticizing the Court’s use of a “great majority” standard in the margin of appreciation doctrine).

¹³⁵ See Convention on Human Rights Preamble ¶ 5.

States, contrary to its duty to remain autonomous?¹³⁶ It is for these reasons that it appears that an emerging-consensus standard is the better approach for determining whether the Court should recognize the existence of a particular right to private life.

2. Ignoring the State’s Justification When Judging the Applicability of Private Life

I have left, until now, the discussion of whether a government’s justifications may be considered in analyzing whether an expectation is reasonable. I believe it imperative that any use of the reasonable-expectations test be performed *without* considering the government’s justifications, motives or goals in interfering or choosing not to act. In other words, the analysis of private life under Article 8(1) must be kept separate from the justification analysis normally undertaken under Article 8(2).¹³⁷ Take, for example, the case where a child claims to have the right to smoke cigarettes at age 13, despite a law outlawing the practice. Under the reasonable-expectations test, we must ask whether a 13-year old child can reasonably expect that the decision to smoke or not would be a personal decision for him or her to make. But how can one perform the private life analysis without taking into account the likely government justification that the law is necessary to protect minors from the harm to health caused by smoking? Admittedly, this may appear conceptually difficult, but the separation is possible. In the hypothetical, for example, the Court might find that most people in a free and democratic society would say that a 13-year old has no right to decide whether to smoke or not, regardless of the government’s reasons for the restriction.

In any event, the analytical separation is required to maintain what I perceive to be a balance of interpretation in the Convention between individuals and States. By virtue of the autonomous and “object and purpose” principles of interpretation,¹³⁸ private life is construed broadly in favor of individuals. Justifications, on the other hand, so long as within the list of legitimate aims, are typically construed broadly in favor of the State, courtesy of the margin of appreciation. There is a sense of equilibrium. To import the justification analysis from Article 8(2) (with its margin-of-appreciation baggage) into the Article 8(1) analysis would unfairly tip the balance against the very people the Convention was created to protect. The State would often be afforded discretion at two different points in the analysis, thereby placing the State at a decidedly unfair advantage.

All that having been said, it is important to note that I am not advocating that no justification analysis ever occur. Quite the contrary, it should occur in the normal course of events under Article 8(2), after the applicant’s private life has been shown to be affected.

¹³⁶ Cf. Arai-Takahashi, *supra* note 123, at p. 195 (“An irony of the comparative method is, however, that reliance on national practice among the majority of Member States might jeopardize the endeavour of the Strasbourg organs to keep the Convention’s standards both autonomous and high.”).

¹³⁷ In this section, I use the label “Article 8(2)” as a shorthand to include not just the justification analysis undertaken in negative obligation cases but also the justification analysis undertaken in positive obligation cases.

¹³⁸ See the discussion in Parts I.A and I.B *supra*.

D. Relation to Family Life, Home and Correspondence

A final issue remains regarding how the reasonable-expectations test should operate vis-à-vis the other rights recognized in Article 8, such as family life, home, or correspondence. It is not uncommon for an applicant to complain of a violation of private life in conjunction with one of these other rights. And oftentimes the rights overlap, such as where the government intercepts a telephone call (correspondence)¹³⁹ made from the caller's house (home) that concerns personal information (private life) about the caller. Should the reasonable-expectations test be used to judge solely the issue of private life or should it also be used to judge all of the other rights contained in Article 8 (including home, family life and correspondence)?

Unfortunately, the Court's decisions offer little guidance on how to answer this question. The Court has not always, when reviewing complaints allegedly involving more than one Article 8 right, treated those rights separately or explained their relationship to one another.¹⁴⁰ This occurred, for example, in *Halford*, wherein the Court was imprecise in separating and analyzing Article 8 claims based on private life and correspondence. Indeed, an argument might even be made that the Court intended reasonable expectations to govern both private life and correspondence claims.¹⁴¹ Moreover, in some cases the Commission has rigidly discussed private life while seemingly ignoring what appears to be an obvious violation of the right to respect for home.¹⁴² Interestingly, even commentators seem to disagree whether the rights should be treated in isolation or melded together.¹⁴³ In any event, there are three possible approaches here:

¹³⁹ Telephone communications are considered a form of correspondence. See *A. v. France*, *supra* note 11, at ¶¶ 33-36; Leach, *supra* note 26, at p. 151 (“[Correspondence under] Article 8 will be engaged where there is interference with a wide range of communications, including by post, telephone, telex, fax, and e-mail.”).

¹⁴⁰ See *Harris*, *supra* note 4, at p. 303 (“Both the Commission and the Court have avoided laying down general understandings of what each of the items covers and, in some cases, they have utilized the co-terminancy of them to avoid spelling out precisely which is or are implicated when an applicant has invoked more than one of them in his claim that there has been a violation of the Convention.”); see also *Klass v. Germany*, No. 5029/71[PC], ¶ 41, A-28, 2 EHRR 214 (6 Sept. 1978) (failing to separate its discussion of private life and correspondence).

¹⁴¹ See *supra* Part II.A.

¹⁴² See, e.g., *Artinstoll v. UK*, No. 25517/94, 19 EHRR CD 92 (3 Apr. 1995) (holding that a regulation prohibiting the keeping of pets in an apartment does not implicate private life, but ignoring whether it might implicate the right to respect for home), *relying on X. v. Iceland*, *supra* note 41.

¹⁴³ Compare *Doswald-Beck*, *supra* note 22, at p. 284 (“In considering the wording of Article 8, it could be said that the right to respect for family life, home and correspondence are all facets of private life. . . . [However,] [i]t is clear from the practice of the Commission and Court that the term ‘private life’ is meant to have a meaning of its own, independent of rights relating to family, home and correspondence.”), with *Ovey*, *supra* note 9, at pp. 217-218 (“[T]he fact that the rights in Article 8 are grouped together in the same article strengthens the protection given by that article, since each right is reinforced by its context. Thus, the right to respect for family life, the right to privacy, and the right to respect for the home and correspondence may be read together as guaranteeing more than the sum of their parts. . . . [¶] It is quite clear, for example, that wire-tapping, unless it can be justified in a particular case under paragraph (2), is prohibited by Article

1. The reasonable-expectations test of private life eliminates the other rights as separate, standalone grounds for a claim and is thus the sole method by which to demonstrate a violation of Article 8;
2. The reasonable-expectations test of private life is the conclusive test, but the involvement of one or more of the other rights (*e.g.*, home) creates a presumption that the applicant’s expectation of privacy or personal choice is reasonable, shifting the burden to the Government to prove that there is a consensus to the contrary;¹⁴⁴ or
3. Each right under Article 8(1) has its own independent meaning, such that, for example, a violation may be found of the right to respect to home, even though there was no reasonable expectation of privacy in the activity that took place there.

Of the three options, the first may be discarded with little discussion. Quite simply, it would be irresponsible and contrary to the intention of the contracting States to render the remaining rights superfluous by eliminating them all together. The second option certainly is more appealing; however, the only reason to adopt it would be if one buys into the idea that all the rights in Article 8 are interrelated (or related to private life) and cannot be parsed out one from the other, as has been argued by some. But I question whether the presumption explanation would even be workable in this context, given that it assumes that the Court would normally impose the burden of persuasion on the applicant to prove a consensus, but even that is unclear. I also question whether the results of such an important issue as the existence of such a right should depend on the Government’s ability *alone* to muster the necessary evidence of and emerging consensus.

The last option obviously is the most straightforward and favorable to applicants, as it presents them with four separate ways by which to demonstrate that a right has been implicated under Article 8, and appears the most consistent with the goals of the Convention. I would therefore be inclined to select the first option. In any event, this is a matter that the Court should clarify in future cases, particularly if adopts the reasonable-expectations test as its benchmark for private life.

8, and it matters little whether it is considered an interference with correspondence, or with privacy, or even with the home if it takes place there, since these notions should be considered together rather than in isolation.”); *Marckx*, *supra* note 12, ¶ 31 (Fitzmaurice, J., dissenting) (positing that the various rights of Article 8 are all related to the notion of “domiciliary protection of the individual”).

¹⁴⁴ Interestingly, the United States, when presented with a similar issue relating to its use of the “reasonable expectation of privacy” test, has adopted an approach somewhat similar to this one. Reasonable-expectations is the determinative test and all of the more specific rights in the Fourth Amendment to the United States Constitution are not in themselves grounds for a claim that an unreasonable search has occurred. *See supra* note 50. However, there is a special proviso that if a warrantless search occurs inside a *home*, there is a presumption that the search violated the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 586 (1980).

IV. CONCLUSION

I have in the preceding pages proposed a framework by which private life can be assessed by asking whether the applicant had a reasonable expectation of privacy or personal choice in the matter involved. Along the way, I have traced the seeds of such a test in the Court's jurisprudence and highlighted some of the principal issues the Court will come upon should it choose to use reasonable expectations as its standard. Although the Court will likely encounter some difficulty in administering the reasonable-expectations test at first, I believe those difficulties can be overcome in time as the Court becomes more accustomed to its application.

So, does the workplace-smoking ban in Levanger, Norway implicate private life under Article 8? That remains to be seen, and I imagine that if the Court ever heard the case that it would be one of the tougher ones to decide. Assuming the Court applied the reasonable-expectations test, it would want to parse the smoking ban into pieces and consider each of its aspects separately--*e.g.*, the applicant's expectations of personal choice in smoking in the office and smoking while on a break outside the office. I suspect that the Court would find the latter expectation to be reasonable without much trouble, but that the former would be hotly contested. In any event, we may soon have some guidance on how the case would come out given that the Strasbourg institutions are currently considering a similar issue.¹⁴⁵ It will be interesting to see if the Court attempts to tackle the matter within the rubric of reasonable expectations.

¹⁴⁵ See *Aparicio v. Spain*, No. 36150/03 (4 May 2004) (communicating to the State the issue of whether a non-smoking prisoner's private life has been violated by virtue of the fact that there are no non-smoking sections in the community areas of the prison and the government has refused to ban smoking all together in those areas).

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